

when the breach referred to in the notice is not remedied within the time limited by section 254 that the chargee is entitled to take proceedings for an order for sale of the land — not until then. Notice in Form 16D is thus a statutory notice prescribed by the National Land Code and which is applicable to any breach of agreement, express or implied, in any charge and the service of that notice is a prerequisite to the chargee initiating any proceedings for sale of the land in question. The breach under section 254 may be any breach whether in the payment of interest or principal or in making default in the payment of the whole amount including interest which may have fallen due or in the non-observance of any of the conditions and stipulations in the charge. Notice in Form 16D gives the chargor an opportunity to remedy the breach. Notice in Form 16E gives an opportunity to pay the *principal sum* which is secured by the charge and which is *payable on demand*. Notice in Form 16E is the mode prescribed for making the demand under section 255 and once that notice is served on the chargor and he does not pay the sum, *i.e.* the *principal sum* within one month of the date of the service on him of the notice, the chargee then becomes entitled to apply either to the court or the collector for an order for sale of the land without having to serve another notice in Form 16D under section 254 (for comparison see sections 138 and 139 of the repealed Land Code (Cap. 138)).

Now the principal sum constitutes the original sum which was lent and which on being lent yields interest to the chargee. The meaning given to it in the *Shorter Oxford English Dictionary* is that of the original sum dealt with in any transaction as distinguished from any later accretions; it is the capital sum as distinguished from interest.

If the principal sum secured by the charge is payable on demand it can only be so by virtue of an agreement between the chargor and the chargee. In such a case a demand by the chargee is a condition precedent to the liability of the chargor and the coming into existence of the chargee's rights under the charge or under the National Land Code. There is a clear distinction between a right which is a present enforceable right and a right which is not enforceable until after demand.

When this application came up for hearing the counsel for the respondent raised a preliminary issue as to the validity of the notice given by the applicant under section 255 of the National Land Code. The notice served on the respondent was not for repayment only of the principal sum lent; it also included interest. The charge executed by the respondent was not a charge to which section 255 of the National Land Code applied. The only valid and effective notice which the applicant was entitled to give was the notice under section 254 of the National Land Code and this he failed to do. (See *Hardial Singh v. Harbans Singh*⁽¹⁾ and *R.M.S.T. Somasundram Chetty v. Ng Sin Yan*⁽²⁾).

The respondent succeeds on the preliminary issue. The application is dismissed with costs.

Application dismissed.

A Solicitors: *Elyas Majeed & Co.; M. Segaram & Co.*

B

WOLFGANG PZETZOLDT v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) April 10, 1970]

[Malacca — Criminal Appeal No. 4 of 1970]

Customs and Excise — Prohibited goods — Knowingly in possession of prohibited goods — Knowingly concerned in dealing with uncustomed goods — Knowledge — Mens rea — Customs Act, 1967, ss. 135(1)(d) and 133(1)(e).

C

This was an appeal against the conviction of the appellant on two charges under the Customs Act, 1967 of (a) knowingly being in possession of prohibited goods under section 135(1)(d) of the Customs Act, 1967 and (b) knowingly being concerned in dealing with uncustomed goods under section 135(1)(e) of the Customs Act, 1967. The appellant in his defence had stated that he obtained the walkie talkies, the subject of the charges, in Singapore and that he had been allowed to bring the goods into Malaysia with him in the bus in which he was travelling as a passenger. On arriving at Malacca he went to see the chief police officer with the object of selling the walkie talkies to the police. The appellant was told that the police got their walkie talkies from their headquarters and that he should if he wanted to sell them, try some local shop. Neither the appellant nor his witness was cross-examined by the prosecution.

D

E

Held, allowing the appeal: (1) as regards the first charge under section 135(1)(d) of the Customs Act, 1967, the learned president in this case had not adequately considered the import and significance of the word "knowingly" in the definition of the offence and had not directed his mind at all to the absence of cross-examination of the appellant and his witness and to the quantum of proof which the law requires an accused person to rebut a statutory presumption;

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(2) the second charge under section 135(1)(e) of the Customs Act, 1967 required not only knowledge but an intent to defraud the Government of the duty payable or to evade any prohibition under the Act or to evade the prohibition applicable to the goods concerned and in this case the prosecution had not shown that the appellant had such knowledge or intent.

Cases referred to:-

G

- (1) *Frailey v. Charlton* [1920] 1 K.B. 147.
- (2) *Gaumont British Distributors, Ltd. v. Henry* [1939] 2 K.B. 711.
- (3) *Sherras v. De Rutzen* [1895] 1 Q.B. 918.
- (4) *Public Prosecutor v. Yuvaraj* [1969] 2 M.L.J. 89.
- (5) *R. v. Dolman* [1949] 1 All E.R. 813.
- (6) *Evans v. Bartlam* [1937] 2 All E.R. 646.

H

MAGISTRATE'S CRIMINAL APPEAL.

J. Nadchatiram for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

I

Sharma J. (delivering oral judgment): On the 28th February 1970 at about 12 noon the appellant went to a radio shop in Malacca. He had with him 4 pairs of walkie talkies. The Superintendent of Customs, P.W. 1, was waiting in the back room of the radio shop with a customs officer. The appellant placed the walkie talkies on the counter and in came P.W. 1 who identified himself and asked the appellant what he had. The appellant in answer to questions put by him very candidly

told P.W. 1 that he had those four pairs of walkie talkies, that he had brought them from Singapore and that customs duty had not been paid on those articles. He was questioned further and the appellant again very frankly told P.W. 1 that he had some radio equipment at the place he was temporarily staying in at Malacca. The radio equipment was produced to P.W. 1 who took possession of it. The appellant also had in his possession a letter from Tithes Dental and Photo Supplies Sdn. Bhd. stating that they had given a lot of shop soiled electronic equipment to the appellant because that equipment was not of any use to them.

The import of walkie talkies is prohibited under the Customs Act 1967 and they are in that sense prohibited goods. The appellant was charged under section 135(1)(d) and section 135(1)(e) of the Customs Act 1967. The relevant parts of the two charges read as follows:—

First Charge

"That you on 28.2.70... were knowingly in possession of prohibited goods... in contravention of the Customs Prohibition of Imports Order, 1969... and thereby did contravene section 135(1)(d) of the Customs Act 1967..."

which is punishable under section 135(1)(iii) of the said Act.

Second Charge

"That you on 28.2.70... were knowingly concerned in dealing with uncustomed goods... on which the customs import duty amounting to... has not been proved to have been paid and thereby committed an offence under section 135(1)(e) of the Customs Act 1967..."

which is punishable under section 135(1)(i) of the said Act.

The appellant was convicted on both the charges and sentenced. This appeal is against that conviction and sentence.

The appellant in his defence narrated how he had at Singapore obtained all the impugned goods referred to in the charges. According to him the customs authorities at the Johore causeway checked those goods and allowed him to bring them with him in the bus in which he was travelling as a passenger. He arrived at Malacca and went with D.W. 2 to see the chief police officer with the object of selling the walkie talkies to the police. The appellant was at this interview told that the police got their walkie talkies from their headquarters and that he should, if he wanted to sell them, try some local shop. Neither the appellant nor his witness was cross-examined at all by the prosecution. The effect was that the prosecution accepted the statement of the appellant and his witness in its entirety and accepted it without any doubt or reservation. The appellant maintained that he did not know the laws of this country, that he came here as a tourist from Germany, that having brought the goods without any ado from the customs at Johore, it was unfair and improper that he should be punished for what might have been negligence of the customs officers at the Johore causeway.

Section 135(1)(d) of the Customs Act expressly uses the word "knowingly". It is not mere possession of the prohibited goods which is made an offence under section 135(1)(d) but the possession of those goods with the knowledge that they are prohibited. *Frailey v. Charlton*⁽¹⁾ was a case under the Customs Consolidation

Act, 1876 and the head note to that case reads as follows:—

"To constitute the offence of 'knowingly' harbouring prohibited goods" under s.186 of the Customs Consolidation Act, 1876, it is not enough that the party charged had such goods in his possession with intent to convey them out of the United Kingdom, he must have done so 'with intent to evade the prohibition.'

The respondent, a ship's steward, had on board his ship while lying in the Thames preparatory to her departure for a foreign port a quantity of soap, which was intended for the use of the passengers on the voyage. The export of the soap was prohibited by Royal Proclamation, but the respondent was not aware of the fact of that prohibition. On an information against him under the above section for harbouring the soap:—

He held that his ignorance of the prohibition afforded a good defence."

Darling J. in his judgment observed as follows:—

"It is perfectly plain that anyone doing any of those things may set up the defence that he did not do them with intent to evade any prohibition; and it is obvious that he cannot prove the absence of an intent to evade the prohibition better than by proving that he did not know of its existence."

Gaumont British Distributors Ltd. v. Henry⁽²⁾ was a case under section 1(a) of the Dramatic and Musical Performers' Protection Act, 1925. Section 1(a) of the said Act provided as follows:—

"If any person knowingly —

(a) makes any record, directly or indirectly, from or by means of the performance of any dramatic or musical work without the consent in writing of the performers... he shall be guilty of an offence under this Act...."

Lord Hewart in his judgment in this case said:—

"When one finds put up as a danger signal or a signpost at the very forefront of the first section of this statute the words 'If any person knowingly' does certain things, it seems to me that discussions about *mens rea* are of something less than academic interest. The knowledge on the part of the alleged offender is described prominently as an essential ingredient of the offence. The other essential ingredient is that that which he does must be knowingly done without the consent in writing of the performers."

We find a similar danger signal or signpost in the very opening words of section 135(1)(d) which says "whoever knowingly is in possession of prohibited goods." Knowledge consequently is an essential ingredient of this offence.

In the same case (*Gaumont British Distributors Ltd. v. Henry*⁽²⁾) Humphrey J. referred to the case of *Sherras v. De Rutzen*.⁽³⁾ In that case Day J. said:

"It seems to me that the contention that he committed an offence is utterly erroneous. An argument has been based on the appearance of the word 'knowingly' in sub-s. 1 of s.16 and its omission in sub-s. 2. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-s. 1 it is for the prosecution to prove the knowledge, while in cases under sub-s. 2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word 'knowingly' in the one sub-section and its omission in the other."

Wright J. in the same case said:

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals..... But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some

one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence."

The question which the learned president should have asked himself in the present case was "Did the appellant know that he was in possession of the prohibited goods?" According to the evidence in this case it was incorrect to say that the appellant knowingly did what he is alleged to have done. In his grounds of judgment the learned president said: "I considered the accused's defence but it had not rebutted the prosecution case, therefore I found both the charges proved and I convicted the accused." It is not clear from his grounds of judgment how he considered the defence of the appellant.

There is, of course, the presumption under section 135(2) of the Customs Act which reads as follows:—

"In any prosecution under this section or section 139 any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

There is no doubt that the presumption came into operation once it was proved that the prohibited goods were in the possession of the appellant. All that presumption says is that the appellant was thereby deemed to have the knowledge that those goods were prohibited goods unless he proved the contrary. "Knowledge" is a very strong word. It implies a consciousness of facts. It is a word of greater import than "having reason to believe" and cannot in the interpretation of statutes, and more particularly statutes which are penal in their consequences, be equated with suspicion or doubt. The question of the statutory presumption has been very fully dealt with in the case of *Public Prosecutor v. P. Yuvaraj*.⁽⁴⁾ That was a case under the Prevention of Corruption Act, 1961 but the principles applicable are the same.

I may refer to one more case, that is *Rex v. Dolman*.⁽⁵⁾ In that case the accused was charged for bigamy and Streatfeild J., opened his judgment with the following words:—

"The crime of bigamy is the creation of statute, the Offences Against the Person Act, 1861. By s. 57 of that Act an offence is committed by any person, who, being married, shall marry any other person during the lifetime of the former husband or wife. If the prosecution prove that the party accused was married to one person and then went through a form of marriage with another person, that constitutes the crime of bigamy, but it has been held that bigamy, like many other offences, requires that there shall be what is known as guilty knowledge. There must be an appreciation that a crime is being committed. In many cases the law requires that in addition to an unlawful act there shall be a specific intention to do something or other. That does not apply here, but the person accused must have a culpable, guilty knowledge that he is doing something unlawful."

Continuing his judgment, he observed:

"Therefore, although the statute itself does not say that a man shall not 'knowingly' or 'unlawfully' go through a form of marriage, it has for many years been held that a man does not commit the criminal offence of bigamy unless he realises that he is committing that offence. Therefore, it is open to a man to say: 'I had reasonable cause to believe, and I did believe, that my wife was dead.'"

In the circumstances I am of the view that the learned president did not adequately consider the im-

port and significance of the word "knowingly" in the definition of the offence under section 135(1)(d) and did not direct his mind at all to the absence of cross-examination of the appellant and his witness by the prosecution and to the quantum of proof which the law requires the accused to rebut a statutory presumption in the light of the observations of the Privy Council in the case of *Public Prosecutor v. P. Yuvaraj*.⁽⁴⁾

Coming now to the second charge, which is a charge under section 135(1)(e), the charge against the appellant related only to "being knowingly concerned in dealing with uncustomed goods...." Section 135(1)(e) has an additional ingredient besides the ingredient of knowledge and that is the intention to defraud the government of the customs duty "or to evade..." Such an intention to defraud the government is an integral part of the offence under section 135(1)(e) and no mention whatsoever is made in the charge which the appellant was required to meet under section 135(1)(e). I do not understand why a charge under section 135(1)(e) was framed by the prosecution when possession of uncustomed goods could also come under section 135(1)(d) of the Customs Act. In any case it is not only knowledge but also guilty intent which is required under section 135(1)(e). In order to convict a person under section 135(1)(e) of the Customs Act, 1967, mere knowledge on his part that the goods are uncustomed or prohibited goods is not enough. The sub-section further requires that there should also be an intent to defraud the government of the duty payable or to evade any of the provisions of the Act, or to evade any prohibition applicable to such goods. As I have already dealt with the question of knowledge and as the prosecution did not intend to rely upon intention as required under section 135(1)(e), I need not go into the merits of the second charge at all.

In the entire field of criminal law there is nothing more important than the principle of *mens rea*. I may end my judgment by quoting from an observation from Prof. Sayre who says:

"In general the *mens rea* is as vitally necessary for the crime as understanding is necessary for goodness. To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident would so outrage the feelings of the community as to nullify its enforcement."

Professor Glanville Williams similarly in his book "General Principles of Criminal Law" has observed:

"It is an abuse of the moral sentiments of the community. To make a practice of branding peoples as criminals who are without moral fault tends to weaken respect for the law and the social condemnation of those who break it."

The argument was put forward by the learned deputy public prosecutor that everyone was presumed to know the law and therefore it was not open to the appellant to say that he did not know the law of this country and that if a mistake was made by the customs officers at the Johore causeway, this mistake could not be availed of by the appellant in proving "the contrary" required under sub-section (2) of section 135 of the Customs Act, 1967. I think the contention of the learned deputy public prosecutor could best be dealt with by an observation made by Lord Atkin in the case of *Evans v. Bartlam*.⁽⁶⁾ where he said:

"For my part I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not, and never has been, a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a *maxim* of very different scope and application."

In conclusion I am of the view that the learned president misdirected himself both in law and on facts. The appeal is allowed. The order of the learned president is set aside and an order of acquittal and discharge of the appellant is substituted therefor.

Appeal allowed.

Solicitors: *Nadchatiram Bros.*

PUBLIC PROSECUTOR v. SANASSI

[O.Cr.J. (Sharma J.) April 17, 1970]

[Malacca — Criminal Trial No. 2 of 1970]

Criminal Law and Procedure — Trial — Statement of accused from dock — Whether accused has a right to make such a statement — Whether such statement constitutes evidence — Whether statement can include statements made to police during the course of investigations — Criminal Procedure Code (Cap. 21) ss. 5 and 124.

Evidence — Statement of accused from dock — Whether evidence — Evidence Ordinance, 1950, s. 3.

In this case at the close of the prosecution case the accused was asked to enter upon his defence and he elected to make an unsworn statement from the dock. In the course of making that statement he referred to various statements which he said he made to the police investigating officer in the course of his investigations. The question arose whether the accused could make such statement from the dock and whether a statement, which would otherwise be inadmissible, could form part of the statement if the accused elected to make such a statement from the dock.

Held: (1) accused has a right to make an unsworn statement from the dock but such a statement does not constitute evidence and the accused making such a statement cannot be a witness;

(2) those parts of the statement which relate to what the accused told the investigation officer in the course of investigations should be deleted from the statement.

Cases referred to:—

- (1) *State v. Setaram Dayaram Kachhi* A.I.R. 1958 M.P. 99.
- (2) *Moral Majhi v. State* A.I.R. 1958 Cal. 616.
- (3) *Emperor v. Tuti Babu* A.I.R. 1946 Patna 373.
- (4) *Chajju & Ors. v. Emperor* 63 I.C. 460.
- (5) *Shian Sunder v. Emperor* 22 Cr. L.J. 699.
- (6) *Nathu Singh v. Emperor* 88 I.C. 362.
- (7) *Ng Hoi Chen & Anor. v. Public Prosecutor* [1968] 1 M.L.J. 53.
- (8) *Wong Heng Fatt v. Public Prosecutor* [1959] M.L.J. 20.
- (9) *Mohamed Salleh v. Public Prosecutor* [1969] 1 M.L.J. 104.

CRIMINAL TRIAL.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the prosecution.

S. Shunmugam for the accused.

- Sharma J.** (delivering oral ruling): At the close of the prosecution case the accused was asked to enter upon his defence. He was explained the usual three courses open to him and he elected to make an unsworn statement from the dock. In the course of making that statement he referred to various statements which he said he made to the investigating officer P.W. 1 in the course of his investigations. The impression I had at that time, and it is confirmed by the defence counsel, was that the accused was entitled to say what he wished to say from the dock irrespective of whether parts of his statement were hit by the provisions of section 124 of the Straits Settlements Criminal Procedure Code. This was on the ground that as the accused was not being examined and was not to be subject to any questioning either by his own counsel or by the prosecution or the court or the jury, his statement in its entirety, so far as it related to questions on matters arising out of, or connected with the matters in issue, should be taken down by the court in full. I consequently allowed his entire statement and took it down verbatim as interpreted through the interpreter. At the close of that statement, I invited both the learned deputy public prosecutor and Mr. Shunmugam to give me their views on whether a statement, which would otherwise be inadmissible, could form part of the statement of the accused if he elected to make such a statement from the dock. I asked both the learned deputy public prosecutor and the defence counsel whether there was any specific provision under our Criminal Procedure Code which allowed the accused to make a statement from the dock. I was told that that was a time-honoured practice which had been observed in the courts and that this was regarded as a traditional right as it were and that the accused is, always and in all cases, given the usual three options. He could, if he so desired, make an unsworn statement from the dock, although there was no specific provision in our Criminal Procedure Code dealing with the question. The matter was adjourned in order that both the defence counsel and the learned deputy public prosecutor could look into the law and give me the benefit of their examination of the authorities so that I could be assisted in deciding the question. Mr. Shunmugam this morning conceded that those parts of the statement of the accused which related to statements made to the police during the course of investigations should be scored out under the provisions of section 124 of the Straits Settlements Criminal Procedure Code. He further conceded that the statement of an accused made from the dock does not in law constitute what is strictly evidence.

The learned deputy public prosecutor has, however, urged upon me that the unsworn testimony of an accused does constitute evidence in law. This is a matter of some considerable importance and I would very much have preferred to consider it at some leisure after going through the authorities, if any, dealing with the question, but as this question arises in a jury trial it has got to be decided and dealt with here and now. I regret, however, that I suffer from a great disadvantage and handicap in the court here in not having available the necessary books and authorities to which I could otherwise make reference.